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IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 1950. No.

ELIZABETH HEALY, Administratrix of the Estate of JOHN E. HEALY, Deceased,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes Elizabeth Healy, Administratrix of the Estate of John E. Healy, deceased, and the above named petitioner, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit, rendered and entered in this cause on September 11, 1950.

DECISION AND JUDGMENT OF THE COURT BELOW.

The opinion of the Court below, as amended on October 10, 1950, is reported in 184 F. 2d 209 (C. A. 3, 1950). The opinion appears on page 181 of the Record filed herewith.

NATURE OF CASE AND SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a death action under the Federal Employers' Liability Act (Title 45 U. S. C. A., Sec. 51, et seq.) brought by the petitioner here, the widow and administratrix of an employee of the defendant. The death of plaintiff's husband occurred on December 4, 1944, while he was in the employ of the defendant, Pennsylvania Railroad Company, when he was struck and killed by an engine of the defendant at Cresson, Pennsylvania. *Defendant's answer admitted that decedent was fatally injured at Cresson.*

Defendant presented no evidence in the case. The plaintiff's testimony was obtained almost exclusively from the mouths of defendant's employees, some of whom were obviously hostile at least in the sense of being the very persons charged with negligence, and whose testimony therefore was presented as on cross-examination (R. 25-32).

The main facts were not disputed at the trial, and the controversy was principally as to the inferences to be drawn from proved facts.

On December 4, 1944, decedent, along with a group of fellow employees, was instructed by his foreman to report to the town of Gallitzin, there to be picked up by the defen-

dant's truck and be taken to a war bond rally to be held in Cresson, Pennsylvania (R. 41). The foreman had given these instructions pursuant to directions from his supervisor. The rally was to take place during company time, and employees were to be paid for all time spent in going to and attending the rally (R. 61).

Decedent had previously subscribed for bonds through defendant's payroll deduction plan. One such bond, though paid for, had not been delivered and was overdue (R. 11, 56, 63). Under the practice of the defendant, complaints for non-delivery could be registered with the foreman or with the supervisor at Cresson, to whom in any event the foreman would go on receiving complaints from the employee (R. 49, 50).

On the morning of the rally, decedent told both his wife and a track foreman of the defendant that he was concerned about the undelivered bond, and that he planned to inquire about it (R. 11, 56, 63).

On arrival at Cresson, decedent and his fellow employees found the doors of the rally hall still closed (R. 54). Shortly after said arrival, possibly five or ten minutes, word reached the men in the hall, by this time opened, that decedent had been struck and killed at Cresson Station (R. 56), a short distance away from the rally hall, and on the route which would take decedent from the hall to the supervisor's office on the other side of the tracks (R. 60).

Decedent was struck by a train of some seventy cars moving eastwardly (R. 13), at a speed of about five to eight miles per hour (R. 15). The power was shut off, and the train was just "floating along" (R. 14) and therefore moving relatively quietly (R. 15) as it approached the point at which decedent was struck, at or near a baggage cross-walk (R. 70) which was frequently used by defendant's employees in crossing the tracks (R. 15, 19, 57).

Although he had worked on this division for some seven or eight months and necessarily passed this wooden baggage-way or cross-way once or twice every two weeks, the

fireman had not familiarized himself with or been told of the existence of this cross-way (R. 81). The engineer, who had been working along this route almost seven years (R. 19), admitted he knew of the existence of the baggage cross-walk and of the fact that it was used by employees of the company (R. 19), but apparently did not instruct the fireman about it (82a).

The accident occurred about eight o'clock on a foggy morning, but there was visibility for about fifteen car lengths (R. 155).

Admittedly, the engineer, on approaching the station cross-way, saw a man dressed in a yellow or brown coat (R. 15) (the uncontroverted evidence is that the decedent was wearing a tan coat) (R. 12) going from south to north (R. 16) (apparently en route to the supervisor's office) (R. 15).

Despite (1) the engineer's knowledge of the cross-over, (2) his knowledge that it was used by employees, (3) his knowledge that a man was in fact going over this very cross-over, (4) his knowledge that the train was "gliding" without power, and therefore moving relatively quietly or noiselessly (R. 15), and (5) the fact that the sounding of the whistle is required by Rule 14 (p) of the Railroad (R. 126), the engineer not only failed to blow the whistle (R. 154, 25, 26, 35), but he failed to say anything to his fireman about the cross-over or about the man who was then crossing (R. 20) ahead of them.

The fireman did not look out of his cab until after the decedent had been actually hit and was rolling in the six-foot (R. 70). Nor apparently did the engineer continue to look in the direction of the crossing after he there saw the man in the tan coat. As the opinion of the Court of Appeals indicates, a "hiatus" then occurred. Since neither the engineer nor the fireman thereafter looked toward the cross-over, neither saw anyone at the cross-over until after the decedent's body had been hit and was rolling in the right of way. At that point, the fireman told the engineer to "hold it", and informed him that they had run over

"somebody—a man" (R. 19, 73). The engineer did not throw on his emergency brake, but instead gave the brakes an ordinary "service" application. As a result, the train continued five car lengths before coming to a stop (R. 19). The "emergency" application would have stopped the train in one and a half car lengths (R. 123).

Under the rules of the company, both the engineer and the fireman were required to maintain a constant look-out ahead under the circumstances (R. 21), and to apprise one another of what each saw (R. 21, 127, 128). At the time of the accident, one looking out of the cab of the engine, on approaching the cross-way, would have clear visibility for about fifteen hundred feet (R. 83).

Under these facts, the jury returned a verdict in favor of the plaintiff widow in the sum of $15,170.60. Defendant's motion for directed verdict and for a new trial were denied by the Trial Court. The Court of Appeals then held that the evidence was sufficient to show that it was probable that the decedent was crossing the tracks to inquire about his bond; that the question of whether Healy was within the scope of his employment had been properly left to the jury, and that the decedent's trip to inquire about the bond was not beyond the scope of his employment. But the Court of Appeals reversed judgment on the reasoning that "the only conceivable negligence on the part of the Railroad lies in the fact, for we must assume it to be a fact, that the engineer did not sound his whistle as he reached the station as required by Rule 14(p)", and that there is "nothing to demonstrate a causal connection" between the failure to sound the whistle and the happening of the accident, beyond speculation. This petition for certiorari follows.

BASIS OF JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered September 11, 1950. The jurisdiction of this Court is invoked under the provisions of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 56) and the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. A., Sec. 1254).

QUESTIONS PRESENTED.

1. Did not the Court of Appeals (Third Circuit) err in reversing judgment, entered on a verdict for the plaintiff, on the sole ground that no causal connection had been "demonstrated" between what the Court conceded to be the "negligence" of defendant's engineer in failing to sound a warning whistle, and the death of plaintiff's decedent, where the Court overlooked, failed to consider, or even to mention a number of other glaring items of substantial negligence as to which there could be no question of causation, and instead treated the defendant's failure to sound the whistle as "the only conceivable negligence"?

2. Even if failure to sound the whistle was the only negligence of the defendant's employees, as suggested by the Court of Appeals, did not the Court err in holding as a matter of law that such negligence was not a cause in whole or in part of the death, despite the jury's verdict to the contrary after the charge by the Trial Court had left the question of causation to the jury?

3. Does not the decision of the Court of Appeals deny to the plaintiff a right to a jury trial on the questions of negligence and causation as guaranteed by the Federal Employers' Liability Act, the Constitution of the United States, and repeated decisions of this Court?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The record in this case is replete with evidence, much of it coming from the mouths of culpable agents of the defendant, of glaring elements of negligence which the Court of Appeals apparently entirely failed to note, as to which there could be no problem of causation, or at least as to which a clear jury issue was presented. These elements of negligence are so glaring that the failure of the Court of Appeals even to refer to them is suggestive of clear oversight on the part of the Court in reading the record and would result in a serious miscarriage of justice, unless a Writ of Certiorari is granted.

2. Even assuming that the only negligence on the part of the defendant was the failure to sound the whistle, the Court of Appeals was guilty of patent error of law (1) in holding that no causation had been made out merely because causal connection had not been "demonstrated" with physical absoluteness, (2) in rejecting the implicit finding of the jury on the issue of causation by treating the issue of causation as one of law rather than fact.

3. The opinion of the Court of Appeals is obviously in conflict with decisions of this Court, with respect to plaintiff's right to a jury determination of issues of causation,

and clearly warrants granting of this Petition for Certiorari and reversal of the judgment of the Court of Appeals. See, e. g.,

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 (1944);

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946);

Coray v. So. Pac. Ry., 335 U. S. 520, 69 S. Ct. 275 (1949);

Penn v. Chi. and N. W. Ry. Co., 335 U. S. 849, 69 S. Ct. 79 (1948).

4. The opinion of the Court of Appeals is clearly in conflict with decisions in other Circuits with respect to the plaintiff's right to a jury determination of the issue of causation. See, e. g.,

Casey v. American Export Lines, 173 F. 2d 324 (C. A. 2, 1949);

Eglsaer v. Scandrett, 151 F. 2d 562 (C. C. A. 7, 1945);

Kurimsky, Admx. v. Unity Rys. Co., 357 Pa. 521 (1949).

PRAYER.

Petitioner prays that a Writ of Certiorari be granted by this Honorable Court directed to the Court of Appeals for the Third Circuit to the end that the record in this case be reviewed by this Court, and that upon such review the judgment of the Court of Appeals be reversed, and that petitioner have such other relief as this Court may deem appropriate.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In this case the Court of Appeals for the Third Circuit has reversed a judgment entered by the Trial Court on a jury verdict in a death action brought under Federal Employers' Liability Act. In so reversing judgment, the Court of Appeals concluded that there was negligence on the part of the railroad in failing to sound a warning whistle to apprise decedent of the approach of the train which struck him. But the Court described the omission to sound the whistle as "the only conceivable negligence on the part of the railroad."

The sole prop for the holding of the Court of Appeals in favor of the defendant is epitomized in the following one sentence of the opinion:

> "There is nothing to demonstrate a causal connection between the failure of the engineer to sound the whistle and the happening of the accident or that that failure contributed 'in whole or in part' to Healy's death."

It is respectfully submitted that the opinion of the Court of Appeals made two flagrant errors. The first was a patent error of fact as to the nature and extent of the defendant's negligence; the second was an error of law in assuming that causation must necessarily be "demonstrated" with mathematical or absolute certainty. Each of these errors will be discussed seriatim.

A. The Court of Appeals erred in assuming that the only negligence was the failure to sound a whistle.

The assumption, without question or discussion (by the Court of Appeals) that the only evidence of negligence was

the failure to sound a whistle is so easily refuted even by a casual examination of the record as to suggest plain oversight by that Court in reading the record. It is not as though the Court had considered other alleged elements of negligence, and rejected evidence thereon as insufficient. The opinion simply fails to advert *at all* to a whole series of cumulative circumstances, besides the failure to blow the whistle, all of which not only easily support a finding of negligence, but also a finding of causation. In other words, assuming, pro arguendo, that causation is lacking so far as the failure to blow the whistle is concerned, there can be no question about the existence of causation with respect to these other items of negligence. Needless to say, the rejection of a jury verdict based on "quantum of evidence" merely because of an Appellate Court's inadvertent failure to note the full contents of a record, should not be sustained where the consequence would be a clear miscarriage of justice.

The evidence is clear that defendant's engineer knew (R. 19) and it was a notorious fact that there was a cross-way over which employees of the defendant habitually walked (R. 15, 19, 57). This fact alone imposed an obligation upon the defendant to anticipate employees on foot at the crossing and to maintain a lookout for them when trains approached. This duty arises even with respect to *trespassers* who are known to use a path or cross-way, and, a fortiori, where the pedestrian is an employee of the railroad. See Restat. Torts, Secs. 335 and 336, especially Illustration 1 under Sec. 336.

Yet here the fireman on the engine which struck the decedent, although having worked in this area for seven or eight months, did not know of the cross-way, was never apprised thereof (R. 81), and therefore, admittedly kept no lookout as the train approached the point of impact (R. 70). Apparently the decedent was struck by the far or fireman's side of the engine (R. 17). Since the track was straight, and the visibility clear and adequate, is it not self-evident

that the failure of the fireman to look out under these circumstances justified a finding by the jury of negligence having a *substantial* causal effect? Certainly the jury was entitled to conclude that the accident was the result, in whole or in part, either of the railroad's placing an unqualified or incompetent fireman on this train because he was unacquainted with this territory, or the result, in whole or in part, of the fireman's failure to maintain a lookout for employees whose presence he was under a duty to anticipate.

The engineer admittedly knew of the existence of the cross-way (R. 19), yet he apparently failed to keep a lookout, even after being put on notice of the possible presence of pedestrians, when he admittedly saw a man in a yellow or brown coat at the crossing (R. 15). Visibility was clear for fifteen car lengths (R. 155). As has often been declared judiciously, one will not be heard to say that he looked, if he failed to see what must have been directly before him.

> *B. & O. R. R. Co. v. Muldoon*, 102 F. 2d 151 (C. C. A. 3, 1939).

Admittedly, both the engineer and the fireman were required by company rules to maintain a constant lookout, apart from any knowledge of this cross-way (R. 21). Apparently neither maintained a lookout.

But that is not all. Here there was not only constructive notice that employees might be present at or near the cross-way—there was actual knowledge on the part of the engineer of the presence of a human being on the cross-way. Nevertheless, admittedly, the engineer said nothing to the fireman that he had seen a man dressed as was the decedent at the crossing (R. 20). The engineer was silent, although admittedly both the fireman and the engineer are required under company rules to apprise and check with the other as to what each sees (R. 21, 127, 128). Can there be the slightest doubt that, apart from the fireman's failure to keep a lookout, (a) the engineer's failure to keep a lookout, and (b) the engineer's failure to warn the fireman of the

existence of the cross-way and of the man in the tan coat, as well as (c) the railroad's failure to make sure that its crew knew that this cross-way was habitually so used, constituted elements of negligence, individually and cumulatively, establishing substantial and sufficient evidence to sustain a jury's finding of negligence and causation?

Knowledge on the part of the fireman and engineer that the train was gliding without power and that therefore it was moving relatively quietly or noiselessly, accentuated the need for due care (whistle) upon approaching a known cross-way. The degree of care is commensurate and increases with the seriousness of the risk to be perceived.

> *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67, 63 S. Ct. 444, 451 (1943);
> *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 353, 63 S. Ct. 1062 (1943);
> *Blair v. B. & O. R. R. Co.*, 323 U. S. 600, 604, 65 S. Ct. 545, 547 (1945).

Does not the fact, in the instant case, that a man dressed identically like the decedent, *was seen* heading over the cross-walk, render a jury issue even more compelling than in *Tiller v. Atlantic Coast Line R. Co.* (supra), where the Court held that a jury issue arose despite lack of specific knowledge that any particular person was in the ambit of danger, and mere general knowledge that employees *might* be there, was held sufficient to create a duty of anticipation and warning?

But there was still more. After seeing the body of plaintiff's decedent rolling, the fireman told the engineer to "hold it", because they had run over somebody, a man (R. 19, 73). Admittedly the engineer did not throw on his emergency brake but instead gave the brakes an ordinary "service" application (R. 19). As a result, the train continued to move five car lengths before coming to a stop (R. 21, 154). An "emergency" application would have stopped the train in one and one-half car lengths (R. 123). Cer-

tainly a jury could justifiably conclude that had the brakes been applied properly, at least the injuries might have been minimized.

Not one word appears in the opinion of the Court of Appeals with respect to any of these phases of negligence, all of which, in substance, were disclosed by the culpable wrongdoers themselves.

Each of these items of negligence alone was ample to sustain a jury issue both as to negligence and causation. Viewed in the aggregate or collectively, there can be no possible doubt of the sufficiency of the evidence for a jury issue. As this Court said in *Blair v. B. & O. R. R. Co.* (supra):

> "The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pac. R. Co. v. Hadley,* 246 U. S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the other."

It seems inconceivable that the Court of Appeals would not at least advert to this cumulative evidence except upon the hypothesis that it failed completely to review or remember the record. In any event, the jury was justified in predicating its verdict upon these phases of negligence as well as upon the failure of the defendant to sound the whistle, and the sufficiency of the evidence to support a finding of causation with respect to these other phases of negligence seems clear beyond peradventure.

B. The Court of Appeals erred in holding as a matter of law that the failure to blow the whistle was not a cause of the accident.

Ignoring the various elements of negligence just discussed and assuming, pro arguendo, that the only negligence of

the defendant lay in the engineer's failure to sound the whistle after observing the decedent (the man in the tan coat) while walking over the cross-way, it is submitted that the Court erred in holding as a matter of law that the failure to blow the whistle was not the cause of the accident. *The Court in effect required plaintiff to "demonstrate" that the accident would not have happened "but for" the failure to blow the whistle.*

But in dealing with negligence which takes the form of an omission, such as a failure to blow a whistle, or a failure to maintain proper lighting, "demonstration" of a "but for" causal relation to physical absoluteness or certainty is impossible. As Professor Prosser has pointed out in his admirable treatise on Torts (at page 325):

> "The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. Proof of what we call the relation of cause and effect, that of necessary antecedents and inevitable consequences, can be nothing more than 'the projection of our habit of expecting certain consequents to follow certain antecedents merely because we had observed those sequences on previous occasions'. If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists.
>
> "Thus it is common experience that unlighted stairs create a danger that someone will fall. Such a condition 'greatly multiplies the chances of accident, and is of a character naturally leading to its occurrence'. When a fat woman in a hurry tumbles down the steps, it is a reasonable conclusion that the bad lighting has played a substantial part in the fall. Such inferences, in doubtful cases, are of course for the jury." (Citing ***Reynolds v. Texas & Pac. R. Co.***, 37 La. Ann. 694, 1885,

which is the basis for Illustration 3 under Rest., Torts, Sec. 432.)"

In this case, the engineer having been guilty of negligence in failing to sound his whistle, it is impossible to demonstrate mathematically that *but for* such failure the accident would not have happened. But the jury here was certainly as much entitled to decide that sounding of the whistle would have apprised the man in the tan coat of the noiseless approach of the engine, as the jury was in *Reynolds v. Texas & Pac. R. Co.* (supra), to determine that the absence of light was a contributing factor to the accident.

In *Kirincich v. Standard Dredging Company,* 112 F. 2d 163 (C. C. A. 3, 1940), decedent, a deck hand, fell off a barge in tidewater. Fellow deck hands immediately cast ropes or heaving lines one inch in diameter in his direction, three times. One line came within two feet of the spot where decedent was struggling in the water, but because he was unable to swim, he was unable to grasp the line. An action for his death was brought on the sole theory that available life preservers which were buoyant, rather than the one-inch ropes which sank, should have been thrown in his direction. It was argued by the defendant that if he could not swim two feet to catch a rope, he could not have swum two feet to catch the life preserver and that, therefore, causation had not been shown. But the Court held (relying upon *Zinnel v. U. S. Shipping Board Emergency Fleet,* 10 F. 2d 47 (C. C. A. 2, 1925)) that causation had been made out, even though "nobody could in the nature of things, *be sure*" that the use of life preservers would definitely have averted the accident. Compare to the same effect, *DiNicola v. P. R. R.,* 158 F. 2d 856 (C. C. A. 2, 1946).

This Court, having laid to rest, once and for all, the argument that a plaintiff is required to eliminate every possible cause of the injury other than the one which indicates negligence on the part of the carrier (see *Lavender v. Kurn* (supra); *Myers v. Reading Co.,* 331 U. S. 477, 67 S. Ct. 1334

(1947)), now finds itself faced with the reincarnation of a doctrine rejected and discredited in ordinary tort cases long before the advent of the Federal Employers' Liability Act. Lest serious inroads be made into the full right to trial by jury in F. E. L. A. cases, this Court should re-inter this vicious doctrine which holds that a mechanical demonstration of causation is necessary for recovery.

A certain amount of speculation or conjecture with respect to causal connection is inevitable in any case, particularly where the evidence takes the form of an omission. In any event, many prior pronouncements of this and other Courts make it plain that the issue of causation is one for the jury, despite the necessity for speculation or conjecture in determining causation.

Thus, in *Lavender v. Kurn* (supra), the Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Indeed, far more speculation and conjecture were necessary to establish negligence and causation in *Lavender v. Kurn* (supra), as well as in *Tiller v. Atlantic Coast Line R. Co.* (supra). The latter involved the running down of an

employee by an unlighted engine of the railroad, and the defendant had contended that the cause of death was speculative or conjectural. So too, in *Tennant v. Peoria & P. U. Ry. Co.* (supra), there was no direct evidence as to decedent's precise location when he was run over. The negligence of the railroad lay in its failure to ring a bell. Recovery was allowed although causal connection by failure to ring the bell and decedent's death was even more speculative than in this case. Likewise, in *Kurimisky, Admx. v. Unity Rys. Co.* (supra), recovery was allowed for the unobserved death of an employee; a jury finding of causation was sustained although the only basis for recovery lay in the speculative and conjectural hypothesis that the decedent may have been jerked off the train by a sudden stop and even though there was no direct evidence of any sort that he had been so jolted off the train. See also *Reynolds v. Texas & Pac. R. Co.* (supra), and *Kirincich v. Standard Dredging Company* (supra). See also *Casey v. American Export Lines* (supra), where the Court said at page 327:

> "The defendant contends further that in any event there was no proof of causal relation between the charges of negligence and the death of Captain Casey. It must be conceded that in the absence of proof of such causal connection, the defendant's negligence is not actionable. St. Louis-San Francisco R. Co. v. Mills, 271 U. S. 344, 347, 46 S. Ct. 520, 70 L. Ed. 979; Chicago M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041. It must also be conceded that the precise moment of Capt. Casey's death is unknown and that even if the fire had been discovered promptly and if the inside fire-hose had been available under sufficient pressure without any delay, one cannot know with certainty that the captain's life would have been saved. Cf. Di Nicola v. Pennsylvania R. Co., 2 Cir., 158 F. 2d 856, 857. But almost every verdict of a jury involves the element of speculation or conjecture to some extent."

Not only may causation be established despite conjecture and speculation, but *Coray v. So. Pac. Ry.* (supra), would seem to make it clear that under the Federal Employers' Liability Act even "substantial" cause is not required. It is enough that the injury or death results "in whole or in part" apparently in *any* degree from the negligence of the defendant. Even ignoring the other cumulative evidence of negligence and causation, certainly the jury was justified in finding that the failure to blow the whistle was at least a contributing factor.

It is remarkable that in the penultimate paragraph of the opinion of the Court of Appeals, after having complained that the employee failed to "demonstrate" causation, and having objected to the intrusion of "speculation", the Court, with amazing legal malapropism, cites as authority only cases in which the employee prevailed and in which to do so, speculation and conjecture were necessary. Significantly, the Court failed even to mention, let alone to attempt to distinguish, *Lavender v. Kurn* (supra), and *Myers v. Reading Co.* (supra).

In *St. Louis Southwestern Ry. Co. v. Ferguson*, 182 F. 2d 949, 952 (1950), the defective condition of a coupler, in violation of the Safety Appliance Laws, had been an established fact, known to the plaintiff, prior to his going between the cars for the purpose of adjusting a coupler, when he sustained his injury. Obviously, the injury was not the proximate result of the defective coupler, within the meaning of ordinary tort law. However, the defective coupler was, nonetheless, in whole or in part, a contributing factor in producing the injury, by necessitating the presence of the plaintiff between the cars. There, too, as here, the carrier argued that there was no causal relationship, but merely a condition. Said the Court, in reply:

> "And as to causal relationship, the court in such a case equally has no right to direct a verdict on legalistic refinements between remote and immediate causation. Cf. Carter v. Atlanta & St. Andres Bay Ry. Co.,

supra, 338 U. S. 430, 70 S. Ct. at pages 228 and 229. The Federal Employers' Liability Act, 45 U. S. C. A. §51 et seq., which is the vehicle of suit for injury from a violation of a Safety Appliance Act, gives the employee a recovery right, even though the violation has been only 'in part' responsible for the injury. 45 U. S. C. A. §51. The causal question therefore too must be allowed to go to the jury in every case where there is probative evidence from which it would be rationally possible for any one to be persuaded that the violation has been 'a contributory proximate cause' of the injury. Coray v. Southern Pacific R. Co., 335 U. S. 520, 523, 69 S. Ct. 275, 277, 93 L. Ed. 208. The choice between the conflicting theories of causation, each of which is a rational possibility on some probative fact or facts, is one which the jury alone is entitled to make. Ellis v. Union Pacific R. Co., 329 U. S. 649, 653, 67 S. Ct. 598, 600, 91 L. Ed. 572."

In *Eglsaer v. Scandrett*, supra, at 565, 567, the Court said:

"Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident (as would be the district court's illustration of a shock from a defective electric bell ringer causing injuries and death) in cases where this statute applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence *'in part'* results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,' * * * if the injury or death resulted *'in part'* from defendants' negligence, there is liability.

"The words 'in part' have enlarged the field or scope

of proximate causes * * * in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident. Such a rule found some support in Wisconsin before the statute in question was passed. In Stefanowski v. Chain Belt Co., 129 Wis. 484, 109 N. W. 532, 533, 7 L. R. A., N. S., 955, the court said:

'"* * * The proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have reasonable ground to expect at the moment of his act or default that an injury to some person might probably result therefrom. The act of one creating a peril may none the less be the legal cause of an injury to another because of intervening events which might or might not take place, provided such events are natural and probable, and provided the probability of injury might be reasonably anticipated. In both the Winchel v. Goodyear (126 Wis. 271, 105 N. W. 824), and Yess v. Chicago B. Co. (124 Wis. 406, 102 N. W. 932), cases the intervening event was a slipping of the person injured by reason of surrounding conditions, thus bringing himself within the peril which the defendant had created, and it was held that such events might, by a jury, be

considered natural and probable under all the circumstances."

C. The judgment of the Court of Appeals deprives plaintiff of the right to trial by jury.

This Court has repeatedly held that the right to trial by jury in Federal Employers' Liability cases is a basic and fundamental feature of plaintiff's remedy.

Bailey v. Central Vermont Ry. (supra);
Tennant v. Peoria & P. U. Ry. Co. (supra);
Lavender v. Kurn (supra).

The right to jury trial with respect to issues of causation is as essential an ingredient of the plaintiff's remedy as the right to a jury determination of an issue of negligence. So this Court has indicated on several occasions. See

Tennant v. Peoria & P. U. Ry. Co. (supra);
Coray v. So. Pac. Ry. (supra);
St. Louis Southwestern Ry. Co. v. Ferguson (supra);
Eglsaer v. Scandrett (supra).

The vast majority of the pronouncements of this Court as to the right to a jury determination of the issues have dealt with problems of negligence. It is respectfully submitted that the Court should take this opportunity to remove all doubt which may persist with respect to a similar right to a jury determination of issues of causation.

Cf. *Casey v. American Export Lines* (supra).

CONCLUSIONS.

It must be apparent that the Court of Appeals erred in that:

(1) It completely overlooked a number of other substantial items of negligence as to which causation is indisputable or which at least presented clear issues for the jury;

(2) It required a physical "demonstration" of a causal connection between the omission to sound the whistle and decedent's death;

(3) It has given legal life to the hitherto rejected, dead doctrine of "but for" demonstration in causal relationship. This judicially created wrinkle is a new effort to atrophy the Federal Employers' Liability Act, without legislative warrant for this device, and contrary to the express interpretive mandate of this Court in *Jamison, et al. v. Encarnacion*, 281 U. S. 635, 50 S. Ct. 440 (1929);

(4) It erred in depriving the plaintiff of a right to jury trial on issues of causation, in violation of prior rulings of this Court and in contradiction to the rulings of other Courts of Appeal and of the Supreme Court of Pennsylvania.

A Writ of Certiorari should be granted in this case; the judgment of the Circuit Court of Appeals should be reversed forthwith and the judgment for the plaintiff reinstated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 427.

October Term, 1950.

ELIZABETH HEALY, Administratrix of the Estate of John E. Healy, Deceased,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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